BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBERT D. COX	)	
Claimant	)	
	)	
VS.	)	
	)	
LAFARGE NORTH AMERICA	)	
Respondent	)	Docket No. **1,051,506**
	)	
AND	)	
	)	
INS. CO. OF STATE OF PENNSYLVANIA	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the November 30, 2011 Award by Administrative Law Judge Marcia Yates. The Board heard oral argument on February 22, 2012. Board Member Gary R. Terrill recused himself from this appeal and the Division of Workers Compensation's Director appointed E.L. Lee Kinch of Wichita, Kansas, to serve as Board Member Pro Tem.

APPEARANCES

Michael R. Wallace of Shawnee Mission, Kansas, appeared for the claimant. Daniel K. Luebbering of Kansas City, Missouri, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. It should be noted the record includes the exhibits offered at the hearings and depositions with the exception of the medical reports offered as exhibits at the preliminary hearing.[1]

[1] See K.A.R. 51-3-5a(a).

ISSUES

The claimant alleged he suffered a series of repetitive trauma injuries to his lower back while driving a concrete mixer truck for respondent. Respondent denied claimant suffered repetitive injury and argued claimant suffered a discrete trauma in February 2010 and failed to provide timely notice of that injury. Respondent further argued that claimant's current condition is a natural consequence of his preexisting degenerative back disease, and consequently, did not arise out of or in the course of his employment. Finally, respondent argued claimant did not meet his burden of proof to establish that he is permanently and totally disabled.

The Administrative Law Judge (ALJ) found claimant provided timely notice of a June 2, 2010 date of accident based upon a repetitive series of accidental injuries and sustained a permanent total disability due to his work-related injuries. Respondent requests review of: (1) the date of accident, whether claimant suffered a single trauma or series of repetitive accidents; (2) whether claimant gave timely notice of his alleged accidental injury; and, (3) the nature and extent of claimant's disability, if any. Conversely, claimant argues the ALJ's Award should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant is 60-years-old and has a long history of back problems. At age 10 claimant fractured his back when he fell from a tree. In 1976, claimant was run over by a jeep; however, he believes that incident primarily injured his shoulders and ribs. In 1992, claimant experienced some paralysis from his waist down and in 1997, he was diagnosed with a herniated disk. Claimant has known for quite some time that he has degenerative disk disease in his back.

Despite these problems, claimant drove a concrete mixer truck for more than 18 years for respondent. During that period he was jarred and jostled as the large truck rolled over bumps and dips. Claimant also testified that he often would be jerked about when his seat belt locked up while going over rough roadways. He reported one such incident as occurring in February 2010 and claimant further reported that incidents where the seat belt locked up occurred all the time.

In March 2010, claimant began having increased pain in his lower back and hip. As he continued to work his symptoms worsened. Later that month claimant sought treatment

from his family physician, and was treated by Randy D. Eaton, P.A., who prescribed medications.[2] Eaton's March 25, 2010, office notes read, in part:

> . . . The patient's second concern today is he is having ongoing low back pain. The patient has had a history of back pain for years. He is noticing pain that radiates down into his right leg. He has a history of disk disease.
>
> . . . appears to be in no acute distress. . . . He has decreased range of motion. He does have some tenderness to palpation in the paraspinal muscles in the lumbar region. Leg raises are negative.[3]

But by the end of April 2010, as claimant continued working his back pain had worsened. On April 28, 2010, claimant underwent an MRI which revealed an aortic aneurysm; consequently, claimant promptly consulted a cardiologist. The MRI also revealed a moderate sized disk protrusion at L4-5, which appeared to compress the L5 nerve root and produce both central and lateral stenosis. Another protrusion appeared at L5-S1, which was causing mild central canal stenosis.

Meanwhile, claimant's back symptoms remained unresolved. Towards the end of May 2010 claimant began noting increased symptoms going into his right leg and foot, which he attributed to an inflamed sciatic nerve. Claimant worked for respondent through May 24, 2010, when he was laid off for reasons other than his back problems. He was scheduled to return to work on June 1, 2010, but he was unable.[4] On June 2, 2010, claimant sought medical treatment at the emergency room of the Olathe Medical Center, where he received Morphine and Valium for his pain. The next day claimant received a spinal injection.

Claimant testified he told a supervisor, Doug Berger, on June 3, 2010, about his back injury and that Mr. Berger agreed to process the necessary documents for workers compensation benefits. Earlier that day, claimant learned that if he did not significantly improve in two weeks that surgery would be indicated. During this time period claimant was also seen at OHS-Compcare but claimant did not know if they suggested he not work.[5]

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[2] The parties referred to Dr. Eaton throughout the evidentiary record but the medical reports offered into evidence made reference to Randy D. Eaton, P.A., which normally references a physicians assistant.

[3] Cline Depo., Resp. Ex. C. at 11.

[4] P.H. Trans. at 20.

[5] *Id.* at 18-19.

On September 8, 2010, claimant was examined by Dr. Edward Prostic, an orthopedic surgeon. After examining claimant and reviewing his medical history, Dr. Prostic commented that claimant had repetitious minor traumas through June 2, 2010, to his low back working for respondent and that he had L5 radiculopathy from aggravation of degenerative disk disease at L4-5.

On September 16, 2010, a preliminary hearing was held on claimant's request for medical treatment. The ALJ determined claimant provided timely notice and suffered accidental injury arising out of and in the course of his employment. Dr. Charles Striebinger was designated as the authorized treating physician. On October 15, 2010, Dr. Striebinger performed surgery, a lumbar decompression diskectomy, on claimant's back. The surgery relieved claimant's leg pain but he continued with low back pain and numbness of his medial right foot.

At the regular hearing, claimant testified he was having problems bending at the waist, squatting, sitting or standing for long periods of time and that he needs to change positions frequently.

As previously noted, Dr. Prostic, board certified in orthopedic surgery, examined and evaluated claimant the first time on September 8, 2010. The doctor took a current and past history from claimant and also reviewed his medical records. Claimant complained of pain across his lower back with radiation to his right thigh and constant numbness going to the medial right foot. Upon a physical examination, Dr. Prostic found claimant had hamstring tightness bilaterally both seated and supine, weakness of the right extensor hallucis longus muscle and diminished sensation in the right L5 more than the right S1 dermatone. Lumbar spine AP and lateral x-rays were taken which showed significant degenerative disk disease and disk space narrowing at L5-S1. Dr. Prostic opined that claimant has L5 radiculopathy from aggravation of his degenerative disk disease at L4-5 which was caused by minor repetitious traumas through June 2, 2010. The doctor recommended work restrictions and if his condition deteriorated then surgery may be considered.

Since the first examination, claimant had additional treatment including physical therapy and surgery. Dr. Striebinger performed a diskectomy on October 15, 2010, at Olathe Medical Center and then released claimant from his care on January 10, 2011. On February 11, 2011, claimant returned to Dr. Prostic for a re-evaluation. Claimant continues to complain of pain in his lower back with numbness in his right medial foot. Claimant continues to receive medication to control his pain.

Dr. Prostic reviewed the updated medical records and performed a physical examination. The doctor opined that claimant received partial relief from the low back surgery and continues to have mechanical low back pain and stiffness. Dr. Prostic

imposed restrictions against frequent bending or twisting at the waist, forceful pushing or pulling, captive positioning as well as avoidance of using vibrating equipment. Based upon the AMA *Guides*, Dr. Prostic opined that claimant has a 20 percent permanent partial functional impairment due to his lumbar spine. Since the DRE did not apply to claimant, the doctor used the range of motion model which gave claimant a 30 percent whole body impairment but Dr. Prostic thought that was too high so he discounted it to a 20 percent impairment. Upon cross examination, Dr. Prostic testified that claimant's 20 percent impairment was due to his cumulative low back condition.

When Dr. Prostic reviewed the task list created by Mr. Dreiling, he indicated that claimant could not perform 9 out of 10 of the tasks listed for a 90 percent task loss. But based upon claimant's use of prescription medication and the necessity claimant alternate positions to control his pain, Dr. Prostic further opined that claimant is totally disabled from gainful employment.

Dr. Alexander Bailey, board certified in orthopedic surgery, examined and evaluated claimant on August 23, 2011, at respondent's attorney's request. The doctor reviewed claimant's medical records and also took a history from claimant.[6] The history indicated that in April 2010, claimant was on an air ride in the truck when the seat belt locked causing back pain. X-rays revealed degenerative facet arthrosis at multiple levels particularly the worst at L4-5 and L5-S1 as well as disk space collapse at L4-5 and L5-S1. Upon physical examination, Dr. Bailey found claimant had pain in his paraspinal muscles and limited range of motion in his lumbar spine.

Dr. Bailey diagnosed claimant with severe degenerative changes in the lumbar spine; facet arthrosis at multiple levels; herniated nucleus pulposus at right side at L4-5; disk bulge and annular tear at L5-S1. When asked the cause of claimant's back condition and complaints, Dr. Bailey noted claimant's long history of chronic back pain and stated that he did not believe claimant's work exposure or any potential single event altered the natural history of claimant's ongoing medical condition. Dr. Bailey further opined that he did not think claimant's work contributed to, caused or altered the natural history or course of claimant's spinal condition. Dr. Bailey concluded that claimant's spinal condition was entirely preexisting and not related to a work event in April 2010 and that claimant did not suffer any permanent impairment as a result of his employment.

On cross examination, Dr. Bailey agreed that although claimant had a history of chronic back complaints, he did not have any treatment for his back from 1997 to 2010.

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[6] Dr. Bailey's report indicates claimant settled a previous back claim for 10 percent. No further mention of a preexisting impairment was made and the evidentiary record does not support a finding that respondent is entitled to a credit for preexisting impairment. Moreover, such a credit was not made an issue before the ALJ or mentioned in the briefs to the Board.

Mr. Michael Dreiling, a vocational consultant, met with and interviewed claimant on February 23, 2011, at the request of claimant's attorney in order to provide a job task analysis report. Based on his interview with claimant, Mr. Dreiling created a list of 10 nonduplicative tasks that claimant performed within the past 15 years. At the time of their interview claimant was not earning any wages and Mr. Dreiling concluded that claimant had a 100 percent wage loss. When asked whether claimant would be employable in the labor market, Mr. Dreiling answered that claimant was essentially and realistically unemployable in the open labor market. Mr. Dreiling based his opinion on claimant's vocational profile and testified:

> Q. What was your opinion?
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> A. I felt that based upon his vocational profile he was essentially and realistically unemployable.
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> Q. How did you arrive at that conclusion?
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> A. I took into account his vocational profile which was represented by an individual who was 59 years old, graduated from high school 42 years ago, no further formal academic or vocational training, no transferable job skills consistent with medical restrictions, no typing skills, no computer skills, significant restrictions preventing him from returning to his past work that he performed in the labor market since getting out of high school. He did describe significant problems of prolonged sitting and standing, no longer has a current DOT medical clearance physical, he's using prescription medication for his back condition, and he had not been able to return back to work for his employer where he actually worked since 1992.[7]

Initially, respondent argues claimant only suffered a discrete trauma in either February or March 2010, and notice was not timely because it was not provided until June 3, 2010.

The Board disagrees with respondent's premise that claimant only suffered a discrete trauma. Respondent focuses on a medical report where claimant indicated an onset of pain when the truck hit a bump and his seatbelt locked causing him to twist his back. But claimant testified that the seatbelt would lock up as he hit bumps in the road and that such incidents occurred on more than just an isolated instance in February 2010. The medical evidence shows a definite worsening of claimant's condition between late March 2010, when claimant visited his personal physician, and June 2, 2010, when he sought emergency medical treatment at the Olathe Medical Center. Dr. Prostic opined that claimant's work activities aggravated and worsened his degenerative disk condition.

[7] Dreiling Depo. at 14.

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.[8] The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.[9] In this case, the Board finds the opinion of Dr. Prostic more persuasive. The claimant testified that he injured his lower back in approximately March 2010 and as he continued performing his work activities his condition worsened. Claimant has met his burden of proof to establish that he suffered repetitive accidental injury arising out of and in the course of his employment with respondent.

The Workers Compensation Act provides that the date of accident for repetitive trauma injuries is determined by K.S.A. 2010 Supp. 44-508(d), which states:

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the **authorized physician takes the employee off work** due to the condition **or restricts** the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the **employee gives written notice** to the employer of the injury; or (2) the date the condition is **diagnosed as work related, provided such fact is communicated in writing to the injured worker**. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.[10]

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[8] *Bryant v. Midwest Staff Solutions, Inc., 292 Kan. 585, 257 P.3d 255 (2010); Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984)*; Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

[9] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

[10] K.S.A. 2010 Supp. 44-508(d).

The legislature has adopted the following benchmarks for the date of accident for repetitive trauma injuries and in the following order:

1. The date the *authorized physician* takes the employee off work due to the work injury or restricts the employee from performing the work that caused the injury.

2. The date the employee gives the employer *written notice* of the injury.

3. The date the condition is diagnosed as being work related, *provided* that fact was communicated in writing to the employee.

4. And if none of the above apply, the date as indicated by the evidence but *in no event* the day of the regular hearing or the day before the regular hearing. (*Emphasis added*)

The first option set forth above does not apply as the evidentiary record does not contain evidence that respondent appointed an authorized treating physician or that the authorized treating physician took claimant off work. The Board is mindful that claimant's brief mentions such a document as an exhibit to the preliminary hearing. But such medical records introduced at a preliminary hearing are not considered as evidence in the final award unless stipulated into the record by the parties or if the report is supported by the testimony of the person making the report.[11] Neither instance occurred and the exhibit attached to the preliminary hearing is not part of the evidentiary record for final award. Consequently, the second benchmark would be applicable as claimant filed his application for hearing with the Division of Workers Compensation on July 9, 2010, which constitutes written notice. And claimant had provided respondent notice of the accident on June 3, 2010.[12] Accordingly, notice was timely under K.S.A. 44-520.

The next issue raised on review is the nature and extent of disability, if any. Respondent argues that claimant did not establish that he suffered any impairment as a result of his work-related injuries. Dr. Bailey concluded that claimant's condition was a natural consequence of the preexisting degenerative condition and his work activities did not aggravate the preexisting condition. Conversely, Dr. Prostic opined that claimant's work activities aggravated his preexisting condition and claimant suffers a 20 percent functional impairment and is essentially and realistically unemployable.

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[11] See, K.A.R. 51-3-5a(a).

[12] See, *Saylor v. Westar Energy, Inc.*, 292 Kan. 610, 256 P.3d 828 (2011).

Claimant argues that he is entitled to an award for a permanent total disability. K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

While the injury suffered by the claimant was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2) , the statute provides that in all other cases permanent total disability shall be determined in accordance with the facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[13]

In *Wardlow*[14], the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work. The Court, in *Wardlow*, looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

In this case claimant was also a truck driver, is now physically impaired and because truck driving was essentially all the employment he had ever done he lacks transferrable job skills. Claimant can no longer drive a truck as he was unable to get his DOT certification approved by Dr. Striebinger. Claimant's lack of training, constant pain and necessity of changing body positions are identical to the circumstances that *Wardlow* indicated were pertinent to the decision whether claimant suffered permanent total disability.

Dr. Prostic and Mr. Dreiling both concluded that claimant was unable to engage in substantial gainful employment. Conversely, Dr. Bailey speculated claimant could engage in substantial gainful employment but noted he would like to see a functional capacity examination of claimant in order to determine claimant's true function. And it should be

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[13] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

[14] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

noted that claimant was still taking narcotic medication for his pain when examined by Dr. Bailey. In this instance, the Board finds Dr. Prostic and Mr. Dreiling's opinions more persuasive. The claimant has met his burden of proof to establish that he is permanently and totally disabled.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[15] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Marcia Yates Roberts dated November 30, 2011, is modified to find a July 9, 2010 date of accident and affirmed in all other respects.

IT IS SO ORDERED.

Dated this _____ day of April, 2012.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Michael R. Wallace, Attorney for Claimant
Daniel K. Luebbering, Attorney for Respondent and its Insurance Carrier
Marcia Yates, Administrative Law Judge

[15] K.S.A. 2010 Supp. 44-555c(k).